

IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

MISCELLANEOUS APPLICATION NO. 57 OF 2023

(Arising from the District Land and Housing Tribunal for Mwanza in Land Case

No.374 of 2019)

ABDALLAH RAMADHAN.....1ST APPLICANT

NURU RAMADHANI.....2ND APPLICANT

VERSUS

LEWICO CO. LTD.....RESPONDENT

RULING

6th February & 18th March, 2024

KAMANA, J.

Aggrieved by the order of the District Land and Housing Tribunal (DLHT) for Mwanza that granted the respondent's prayer to withdraw Land Application No.374 of 2019 with leave to refile, the applicants, under section 43(1)(a) and (b) of the Land Disputes Courts Act, Cap. 216 [RE.2019] (LDCA) preferred this application that seeks revision of the impugned order. The application is supported by Mr. Andrew Luhigo, learned Counsel. The grounds advanced by the applicants are:

- (a) That there was an error on the part of the DLHT to allow the withdrawal with leave of refile of the case taking into consideration the stage the case has gone so far;

(b) That the DLHT denied the applicant the right to be heard on the respondent's prayer to withdraw and refile the case.

Briefly, the respondent filed an application in the DLHT seeking orders, among others, the declaration that she had never sold its shops to the applicants. The episode started when the respondent leased her two shops to Parin Shariff and her spouse Shiraz Shariff. During the lease agreement, the couple subleased the two shops to the applicants.

When the lease term ended, the respondent paid a visit to the shops intending to lease them to other persons. To her surprise, the respondent found the applicants occupying the shops. Upon inquiring the applicants how they came into occupation, the respondent was told that the shops had been sold to them by the couple.

Forthwith, the respondent reported the matter to a police station. Upon being questioned by police officers, the applicants changed their story slightly by stating that they purchased the two shops from the respondent. The applicants went ahead and presented the sale agreement.

Following such development, the respondent filed the application in the DLHT claiming ownership of the shops. Upon the closure of the respondent's case, the applicants prayed to submit no case to answer. Following the prayer, the DLHT set a schedule for filing submissions of

both parties in respect of no case to answer. It further set the date for ruling on the controversy. On the date set by the DLHT for ruling, the DLHT acting on the respondent's prayer and in the absence of the applicants allowed the applicant to withdraw the application with leave to refile. It is such an order that led to this application which is strongly opposed by the respondent through a counter affidavit whose affiant is Mr. Joseph Madukwa, learned Counsel.

The application was orally argued whereby Mr. Luhigo, learned Counsel represented the applicants. Mr. Madulu, learned Counsel appeared for the respondent.

Arguing for the application, Mr. Luhigo contended that the DLHT erred in allowing the respondent in this case to withdraw the case with a leave to refile. He argued that even though the law allows a litigant to withdraw his case at any stage with a leave to refile, there are circumstances in which a litigant is allowed to withdraw the case without being afforded a leave to refile.

Amplifying the argument, Mr. Luhigo reasoned that since in the DLHT, the respondent closed its case and parties submitted in respect of submission on no case to answer by the applicants and the matter was set for a ruling, by granting the respondent's prayer to withdraw the case with leave to refile, the DLHT grossly erred. To him, withdrawal of cases

with leave to refile in such circumstances attracts the abuse of court processes in the sense that a claimant who fails to substantiate his case will be at liberty to withdraw his case and file afresh. The learned Counsel rested the applicants' case by urging the Court to set aside the order issued by the DLHT that allowed the respondent to refile his case with costs.

Responding, Mr. Madulu argued that Order XXII Rule 1(1) and (2) of the Civil Procedure Code, Cap. 33 [RE.2019] (CPC) allows an applicant to withdraw his application at any time with leave to refile. He further argued that the applicant is allowed to withdraw his application with leave to refile when the application is likely to fail due to errors that would make the decision inexecutable.

In that case, Mr. Madulu was of the view that the DLHT was correct in granting the withdrawal with leave to refile since the respondent contended that her application when granted would not be executable. He added that the order issued by the DLHT does not amount to the abuse of the court process as the law allows a litigant to withdraw his case with leave to refile. He summed up his arguments by arguing that the withdrawal of the application did not affect the applicants and he asked the Court to dismiss the application with costs.

When he took the floor, Mr. Luhigo rejoined by contending that the proceedings of the DLHT do not state whether the respondent furnished any reason to warrant the DLHT to grant the withdrawal with leave to refile. He held the opinion that the withdrawal was to pre-empt their submission on no case to answer. He further argued that the applicants are extremely prejudiced by the leave to refile the application as they are supposed to defend the application when refiled.

Before delving into the application, I wish to note that according to the records of the DLHT, the application was withdrawn to allow the respondent to prepare herself. This is quite opposite to what was stated in the counter affidavit that the withdrawal was occasioned by some errors in the pleadings. Further, it is quite opposite to what was submitted by Mr. Madulu that the application would not be executable if granted.

Having noted that, the issue for my determination is whether the application is sound or otherwise. In determining the issue, I will not repeat the arguments advanced by the learned counsel for both parties unless necessary.

First and foremost, I think it is logical and relevant to state that the Land Disputes Courts Act, Cap. 216 [RE. 2019] (LDCA) is silent so far as the withdrawals of applications before the DLHTs are concerned. However, the issue is covered in Land Disputes Courts (The District Land

and Housing Tribunal) Regulations, 2003 (GN.174 of 2003). According to Regulation 17 of the Regulations, an applicant is allowed to apply for the withdrawal of his application which may be granted by the DLHT upon consideration of the same. The Regulation reads:

'17. -(1) The applicant may apply to the Tribunal to withdraw his application.

(2) The Tribunal may after consideration of the application under sub-section (1) allow the applicant to withdraw the application and make orders as to costs, at it deems fit.'

My reading of the Regulation convinces me that the application for withdrawing an application that has been filed in the DLHT must be supported by the reasons for such withdrawal. It is through the reasons furnished by the applicant, that the DLHT is put in a position to consider the merits of the intended withdrawal. In other words, the provisions of sub-regulation (2) of Regulation 17 give the DLHT the discretion to grant the withdrawal or otherwise upon consideration of the application. This, in my view, entails that the applicant is under the obligation to furnish reasons for withdrawing the application.

Further, the provisions of Regulation 17 do not vest in the DLHT powers to grant leave to refile an application withdrawn under such

Regulation. This means that the said Regulation is inadequate so far as regulating withdrawals of applications.

Given that, guided by the provisions of section 51(2) of the LDCA, the application of the Civil Procedure Code, Cap. 33 [RE.2019] (CPC) is inevitable. Section 51(2) of the LDCA provides:

'The District Land and Housing Tribunals shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it shall apply the Civil Procedure Code.'

Fortified by that position, I am of the view that Order XXIII Rule 1(1) and (2) of the CPC is applicable in the circumstances of this matter. According to Rule 1 (1), a plaintiff may withdraw his suit at any time after the institution of the same. However, for a plaintiff to withdraw and refile his suit, he must comply with the provisions of Rule 1(2). According to subrule (2), the plaintiff is under the obligation to satisfy the Court on either of the two. One, the suit is bound to fail due to some formal defects. Two, there are sufficient reasons for permitting the plaintiff to refile his suit. The Rule reads:

'1-(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.'

(2) Where the court is satisfied-

(a) that a suit must fail by reason of some formal defect; or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim.'

Before I examine whether the respondent cited "a formal defect" or "other sufficient grounds" as reflected in Rule 1(2) as the reason for withdrawing his application, I think it is relevant to understand the two terms.

A formal defect, in the context of Order XXIII Rule 1(2) of the CPC, is occasioned by non-compliance with the rules of procedure. These include issues relating to time limit, misjoinder or nonjoinder of parties, failure to disclose a cause of action and jurisdiction. In this regard, I am persuaded by the interpretation of the term by the Indian Supreme Court in the case of **V. Rajendran v. Annasamy Pandia (Died)**, Civil Appeal No.861 of 2017. In the said case, the Supreme Court had the opportunity

to interpret Order XXIII Rule 1(3) of the Indian Civil Procedure Code which is *parimateria* to Order XXIII Rule 1(2) of our CPC. It stated the following:

'Formal defect" is a defect of form prescribed by the Rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, mis-joinder of parties, failure to disclose a cause of action etc.'

Concerning "other sufficient grounds", it is my considered view that the grounds must be in the interests of justice and not otherwise.

In his submission, Mr. Madulu contended that the respondent when applying for the withdrawal of her application cited the reasons for such application. The argument was vehemently opposed by Mr. Luhigo who contended that the records do not reflect any reasons for such withdrawal.

I have keenly perused the records and found that on 5th June, 2023 when the matter came before the DLHT for ruling, Mr. Madukwa, learned counsel for the respondent prayed to withdraw the application to pave the way for their preparations. He added that they could refile the application. Reacting to that prayer, the DLHT granted the application. The records are as follows:

'05/06/2023

Akidi: Mh. Murirya. N-Mwenyekiti

Mwombaji: Yupo

Wajibu maombi: Hawapo

*Wakili Madukwa: Tunaomba kuyaondoa maombi haya
mahakamani ili tukajiandae tunaweza kuyaleta upya*

Mahakama:

Maombi haya yameondolewa kama alivyoomba wakili

Madukwa kwa niaba ya mdai

SAINI: MURIRYA. N

MWENYEKITI

05/06/2023'

From the quoted records, it is crystal clear that Mr. Madukwa, learned Counsel for the respondent cited the intention to prepare for the case as a reason for withdrawing the application. However, in my opinion, the urge to prepare for the case after filing it entails poor preparations for the case. Such kind of a reason does not fall within the ambits of Order XXIII Rule 1(2) to warrant the granting of leave to refile in the sense that it is neither a formal defect nor sufficient ground.

I hold so on the reason that the cited reason is irrational for the just dispensation of justice. It will be absurd for this Court or any other justice dispensation machinery to tolerate such kind of irresponsible and behaviour by granting withdrawal of the actions with leave to refile

immediately before the judgment or ruling when the claimants have failed to prepare their cases. This as rightly argued by Mr. Luhigo is an abuse of court process.

Having taken that position, I invoke my revisionary powers by setting aside the order issued on 5th June, 2023. I further order that the matter be remitted to the DLHT to continue from where it was before 5th June, 2023. I award no costs. Right to Appeal Explained. Order accordingly.

DATED at MWANZA this 18th day of March, 2024.



KS KAMANA

JUDGE

